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Introduction: The World of 1992

Daniel Wilkes

THIS VOLUME, *A Century of World Law*, tackles the beginnings and the end of a hundred-year span that has twenty-five years yet to go. Its theme is that there is no better way to tell where international law is going than to look at the road this branch

of the law has already traveled. Thus, each author has divided his study of a given area of world law into three periods: (1) where we were, 1892-1917, the first quarter of this "Century"; (2) where we are, 1967; and (3) where we are going — 1968-1992 — problems of the quarter-century yet to run. This process of "stock-taking"¹ is also perhaps the best way to commemorate a landmark

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event, such as the Seventy-Fifth Anniversary of the Western Reserve University School of Law, which this volume celebrates. For a great law school, too, a landmark year is a stock-taking year, a time of looking back to see the paths chosen and the milestones already in place, and a time of looking forward to assay the choices yet to be made, the bridges yet to be built, and the signposts yet to be erected.

I. THE VERTICAL COMPARATIVE APPROACH

As applied to international law, the process of stock-taking — which might technically be called vertical comparative law — is perhaps most valuable for the perspectives it gives about the present state of "world law," that branch of law which concerns the community aspects of international law in the family of nations.²

¹ This analogy to a corporation's practice of periodically taking inventory of its stocks of goods and supplies reflects the fact that international law decisions like business ones, will be made most "rationally" with an up-to-date picture of the "business" as a whole in mind.

² The term "world law" was introduced into the Anglo-American legal vocabulary by the late Grenville Clark and by Louis Sohn, now Bemis Professor of International Law at Harvard Law School, in CLARK & SOHN, *WORLD PEACE THROUGH WORLD LAW* (1st ed. 1958) and SOHN, *CASES ON WORLD LAW* (1950).

For example, most misconceptions about the punishment of war criminals under present-day world law stem from a lack of awareness of the steps already taken to make clear that certain kinds of military action, including aggressive war, are outlawed and that their perpetrators are personally liable to punishment. These steps go back, even before our Century began, to such precedents as: (1) 1815, the decision to place Napoleon on the island of St. Helena under guard;³ (2) 1856, Declaration of Paris on conduct of warfare at sea;⁴ and (3) 1861, President Lincoln's "Instructions" on conduct during the American Civil War of 1861-1865, and American war crimes trials after the war of Union officers for mistreatment of civilians and prisoners.⁵

The contribution by Robert Bloom, "Steps To Define Offenses Against the Law of Nations," puts that stream of development into a perspective which makes clear the naiveté of those who thought there was a colorable *ex post facto* defense at Nuremberg. Mr. Bloom's vertical analysis of where we are today also makes it clear why the Economic and Social Council of the United Nations (ECOSOC)⁶ has recently condemned the use of domestic statutes of limitations to cut off prosecutions for "War Crimes" and "Crimes Against Humanity" — these world law offenses are deemed adequately defined — and why, on the other hand, Secretary-General U Thant's 1966 Draft Convention against such limitations did not expressly tackle "Crimes Against the Peace" — because there are great difficulties in defining "Aggression" as Mr. Bloom's article describes.

Again, without vertical study, it is easy to fall into the trap of believing that "Aggressive War" is not yet unlawful for want of

³ See Bellot, *The Detention of Napoleon Buonaparte [sic]*, 39 L.Q. REV. 170, 176-81 (1923). The Prussian proposal for capital punishment was rejected there, as was a proposal for trial before an international court. It should be noted that intentional homicide was not itself a capital offense under ancient laws nor in England before the middle of the twelfth century. DIAMOND, *EVOLUTION OF LAW AND ORDER* 280 (1951). Recent use of vertical comparative law has vividly spotlighted the wrong turnings by which states shifted from earlier pecuniary redress to capital punishment for the wrong done the aggrieved family of the victim. *Id.* at 88-287.

⁴ WORMSER, *THE LAW* 520 (1949).

⁵ See generally Wilkes, *Courts of International Criminal Jurisdiction*, in *WORLD PEACE THROUGH LAW*, WASHINGTON CONFERENCE OF 1965 (forthcoming) which sets forth more fully over seventeen landmarks developing the rule of individual responsibility, including the 1914 British Manual of Military Law, the 1915 German Manual, the German Trial of Captain Fryatt in 1916, and the Leipzig Trials of war criminals in 1921, including conviction of Lt. Boldt for sinking the hospital ship *Llandovery Castle*.

⁶ For a discussion of this organization see note 24 *infra*.

an agreed definition of the "aggression" that is prohibited. Yet, since 1815 it has been clear that an attempt to take over all of Europe is unlawful; since 1921, it has been clear that the unwarranted sinking of a hospital ship does not go unpunished;⁷ and since 1946 it has been clear that jointly planning and carrying out the invasion of a neighboring state with the intention of permanent occupation of the entire state cannot go unpunished. The long look backward shows that too many bridges have already been crossed to say now that the aggression presently prohibited does not include such acts as these.

The vertical study of the step-by-step development of individual responsibility for crimes against the law of nations also helps in predicting future trends. This can be seen, for example, in Mr. Bloom's twin theses that (1) by making the individual the subject of international law for penal responsibility, we will be increasingly more ready to accord persons the right to claim international legal protection directly, as has already been done in the complaint procedures of the European Convention for the Protection of Human Rights;⁸ and (2) the gaps created between the individual's right to complain of ill-treatment when his mistreator is not yet held liable to punishment may spell out the next bridges to cross in the area of defining international offenses.

II. AIMS OF WORLD LAW

One other result of this kind of study is to focus on the purposes world law has been deliberately framed to serve. The contributors in this study agree that the following are the three main goals of international law: (1) shaping new forms of agreement and confining disagreement; (2) creating liberty under law; and (3) developing new institutions for cooperation. These aims have remained the same over time. For example, the framers of the invitations to gather in Panama in 1826, at Versailles in 1919, and at San Francisco in 1945 already shared a common stated goal that individual liberty should receive the protections of communal law through the joint efforts of the states invited to attend.

The emphasis which foreign offices have put on these major

⁷ See note 5 *supra*; MULLINS, *THE LEIPZIG TRIALS* (1921). Compare the absence of mention of the Leipzig convictions in attacks on Nuremberg, e.g., VON KNIERIEM, *THE NUREMBERG TRIALS* 395 (1959).

⁸ See generally MUELLER & WISE, *INTERNATIONAL CRIMINAL LAW* 177-97 (1965); see also the recent United Nations conventions discussed in this study by Professor Edward Wise in "Steps Toward the Advancement of Human Rights."

purposes, and on varying subordinate goals, has shifted throughout the Century, and this is reflected in the contributors' studies. Edward Wise's study of "Steps Toward the Advancement of Human Rights," for example, shows that the current United Nations efforts to implement human rights had their precursors in nineteenth century humanitarian interventions; yet today they reflect a new "activist" phase, whose 1967 demands for implementing machinery may have to be given greater priority in the quarter-century ahead.

In a similar way, each of the authors has contributed a building block toward the world law we will probably have in 1992, using the trends and new tools he spells out for his own sample within one of the three broad purposes. In the brief space available, no author could be comprehensive, either for his subject or for any one of the three periods, and none has tried to be. A far more extensive look at the year 2000 is under way elsewhere.⁹ Yet because each topic is representative of a range of problems in world law, the result is an imaginative broad-brush picture of what can, will, or may be done by 1992.

III. THE WORLD OF 1992

What will this world be like? At least six of the authors see key changes in their areas that will help in controlling the use of force in the community of nations.

A. *Nuclear Force*

It will be, for example, a world with widespread use of nuclear power. Stephen Gorove's data shows that world nuclear energy is expected to increase between now and 1980 by twenty-five fold, or will be 2500 percent more than in 1967. At the same rate, the 1992 figure will be almost another 2500 percent more than in 1980, or an astounding five million megawatts of electric power. To cope with quantities like this, engineers have invented the term "gigawatt" for a thousand megawatts, so that they speak of a capacity for 1992 of "5,000GWe."¹⁰ Just how much this increase will mean can be seen in more familiar terms in Table I.

⁹ A multi-volume series of studies to be called THE FUTURE OF THE INTERNATIONAL LEGAL ORDER is being edited by Professors Cyril E. Black and Richard A. Falk under a grant from The Ford Foundation and under the auspices of the Center of International Studies at Princeton University.

¹⁰ For similar estimates, based on 1962 predictions of the United States Atomic Energy Commission, see Schworer & Witzig, *Nuclear Power Today and Tomorrow*, 1 IEE SPECTRUM 120, 124 fig. 2 (No. 7, 1967). Compare recent estimates of 25 GWe

TABLE I

Comparison of Projected Nuclear-Produced Electric Capacity for 1992
and Present Capacities of Non-Nuclear Sources¹¹

Projected world nuclear total for 1992	1,000 x estimated future capacity of Krasnoyarsk Dam complex (U.S.S.R.)
equals	1,100 x estimated future capacity of Churchill Falls Dam (Can.)
5 million megawatts (MWe)	2,500 x Grand Coulee Dam (U.S.)
or	2,900 x estimated Guri Dam (Venezuela)
5,000 gigawatts (GWe)	4,000 x Furnas Dam (Brazil)
or	or
any one of the electrical capacities listed opposite	21 x total United States capacity
	48 x total Soviet capacity
	150 x total Canadian or French capacity
	650 x total Indian capacity

These projections tell us something about the nuclearization of the world's electric plants, a welcome trend for those concerned about air pollution from non-nuclear fuels used by most power plants today. They tell us even more about the qualitative changes in the world of 1992 which the sheer quantitative changes in electric power will reflect. First, this will be a world in which industrialization will be far more widespread. If a nation like Norway, with only 3.7 million people, can be the twelfth largest producer of electrical power today, it is more than likely that every state and region with at least this many people will be using electric power, or its successor, in 1992 to light their houses, heat their buildings, power their manufacturing plants, their computers, and, perhaps, even provide the power source for their transportation. Second, merely by retaining the International Atomic Energy Agency (IAEA) inspection system we have today, this will be a world in which international inspectors will be going into every part of the globe. Professor Gorove's study points out that we already have passed six milestones in this area: (1) Access at all times exists for inspectors to visit any large reactor facility using over sixty kilograms of nuclear fuel a year when placed under the IAEA system.¹²

capacity for the six New England states to be supplied by fifteen reactors already planned for 1990. N.Y. Times, April 3, 1967, p. 47, col. 2.

¹¹ Based on the editor's conservative projection. Current capacity figures are actually for 1964 computed from figures supplied in NEW YORK WORLD-TELEGRAM, THE WORLD ALMANAC 280 (1965); STATISTICAL OFFICE OF THE UNITED NATIONS & DEPT. OF ECONOMIC AND SOCIAL AFFAIRS, STATISTICAL YEARBOOK 1965, at 352-58 (1966).

¹² Professor Gorove in "Maintaining Order Through On-Site Inspection: Focus on the IAEA," describes how this system was adopted by the IAEA Working Group despite the opposition of many states, including the Soviet Union, on political grounds.

(2) Reactors have been placed under the IAEA by nuclear powers, such as the United Kingdom and the United States, when not required to do so.¹³ (3) Inspections under the IAEA system span four continents, cover fifty-seven reactors, and are carried out by international civil servants free from national authority.¹⁴ (4) The nations ready to place reactors under the system have come from both socialist and non-socialist groups.¹⁵ (5) The IAEA now has authority to station resident inspectors at a major plant, the Yankee Power Reactor in the United States.¹⁶ (6) The IAEA has developed effective means of verifying peaceful use of nuclear fuel between inspections.¹⁷

The presence of an international organization such as the IAEA, with the acceptance of the world law responsibilities and of the widespread international administration which it will entail in the 1992 world, will have an effect far beyond the limited area now inspected. It will mean, for example, that a backlog of know-how

Further, he points out that one of the most significant milestones in building controls for a warless world was the fact that the technical requirements for a foolproof system were made to prevail over political factors.

¹³ By 1967, the United States had placed four reactors under IAEA supervision through agreements entered into with the Agency in 1962 and 1964. By the same year the United Kingdom had placed its Bradwell Complex under the IAEA, and, in addition, the United States is transferring to the IAEA certain inspection and control functions under its bilateral Atoms for Peace agreements.

¹⁴ Countries in which inspections had already taken place by 1967 included Congo (Kinshasa), Finland, Norway, Pakistan, and the United States. The impartial selection by the IAEA of inspectors, whether chosen *ad hoc* from the Secretariat or from countries allied to or aided by the inspected nation, has been insisted on despite Bulgarian, Polish, and Soviet opposition, as the inspectors are duty bound not to seek or receive instructions "from any source external to the Agency" — a vital milestone in the development of world law.

¹⁵ Professor Gorove points out that, despite the fact that the Soviet Union has opposed IAEA inspection on Soviet territory, in October 1966 Poland and Czechoslovakia offered to put their civilian reactors under the IAEA if West Germany did the same. It should also be pointed out that in the 1967 Geneva meetings on a Non-Proliferation Treaty, the United States and the Soviet Union were on the side of those seeking IAEA inspectors, if inspections were deemed necessary, while certain European states held out initially for what could conceivably be considered "self-inspection" under Euratom procedures. N.Y. Times, March 1, 1967, p. 9, col. 1; Observer (London), March 5, 1967, p. 13, col. 5.

¹⁶ Again, despite initial rejection of the resident inspector in framing the IAEA's Statute, this unilateral action of a nuclear power has established a precedent which may be essential if power plants are developed that cannot use the "tape and seal" device referred to in note 17 *infra*.

¹⁷ This final milestone is the discovery of a "tape and seal" technique to verify that nuclear fuel rods, capable of producing electricity or heat in a peaceful reactor or nuclear weapons in a non-peaceful one, are not used for military purposes. The tape is so distinctive that if the rods are removed after the inspectors have sealed them into place, the tape break will prove, on a subsequent visit, that a secret removal must have occurred.

on inspections will mature.¹⁸ It will mean, too, that a backlog of credibility about peaceful intentions can arise.¹⁹ The success of existing inspections has already bridged a large credibility gap, for, as Professor Gorove's study concludes, the IAEA inspections "revealed no diversion and created no insurmountable problems."

It is precisely because of this success that Professor Gorove sees a further possibility that the staff now developing the expertise in this area at the IAEA may, by 1992, be monitoring — and, in some cases, making possible (?) — agreements such as these: (1) a non-proliferation of nuclear weapons treaty; (2) a Latin American nuclear free zone agreement; (3) other regional nuclear free zone treaties; or (4) a nuclear disarmament treaty.

It will therefore be not only a world in which the fruits of electric power are growing most widely, but also one in which the inspection techniques needed to spread that growth are used more broadly. Further, what Professor Gorove has shown for the field of energy in using the case history of the IAEA represents a host of world developments in which the peaceful exploitation of technology will require new methods of verification or control, as in the use of space stations, fish conservation and use of the seabed, nuclear desalination, or weather modification.

B. Armed Force and Confining Conflict

The ability to verify that fissionable uranium is not being used to stockpile atomic bombs provides one way to keep down the possibilities of nuclear war. It has one vital side effect as well, for it also keeps down the pressures toward irrational responses that nuclear threats may entail.²⁰

The contributor's studies show some equally crucial tools that will be available in the world of 1992 to limit or avoid the patterns of the world of 1892-1917, a world which Aaron Danzig describes so well in "Meeting Demands for Action as a Community of Nations." In this latter period according to Mr. Danzig, "peace-keeping" was a poor investment. The patterns of that earlier world

¹⁸ Professor Gorove pinpoints three rules of thumb for inspections that have already emerged: (1) consult with domestic authorities in advance, (2) go with national officials to the site, and (3) have informal discussions if discrepancies are found.

¹⁹ Note the relevance this has for efforts to avoid proliferation of nuclear weapons, discussed generally in *A WORLD OF NUCLEAR POWERS?* 140-41 (Buchan ed. 1966).

²⁰ For an excellent discussion of this inter-relationship, see Hoffman, *Nuclear Proliferation and World Politics*, in *A WORLD OF NUCLEAR POWERS?* 89-121 (Buchan ed. 1966).

included, not too infrequently, as Mr. Danzig reminds us, cycles similar to these:

- (1) State X subjectively perceives an insult to it or a violation of law by State Y.
- (2) X demands an adequate apology, reparations, or a halt to the violation from Y.
- (3) Y perceives these demands by X as "unwarranted" under "the actual facts."
- (4) Y considers steps to take, in the light of such "unwarranted" demands, from a protest of innocence or of counter-violations by X to a full mobilization. In the course of discussions in Y, the possibility of bad faith by X is aired, including all outstanding grievances (also subjectively preceived) which Y has against X.
- (5) Y takes one of the "counter-steps" open to it.
- (6) Given X's initial perception, X now perceives, again subjectively, the actions of Y as either:
 - (a) an increase in insult,
 - (b) an admission of the facts alleged to be a violation,
 - (c) a compounding of the violation,
 - (d) a new threat, or
 - (e) a demand by Y that X back down to affirm some overall ascendancy of Y over X.
- (7) Finally, it is now more than likely that X will take a step which repeats the cycle for Y that X has just gone through.

Indeed, to the extent that this was also a world in which royalty frequently had a decisive say in foreign affairs, these patterns could be "played out" between Uncle Bertie (the Prince of Wales) and his nephew Willie (Kaiser Wilhelm II) with equally fateful consequences.²¹ One change since 1917 has been to eliminate this royal "personal equation" as a factor in world law. No longer, for example, can an heir to the British crown sit down to a wedding feast with fifty-four royal relations in Berlin at a time when most of them are more than nominal heads of state.²²

The remaining problem has been to prevent these cycles from remaining unbroken until they lead to acts of war. Here, the pattern itself provides several hints concerning the devices now being shaped for the world of 1992. The first stage, for example, takes

²¹ The imagined slights from his English uncle, later to be King of England, may partially have shaped the role of the German Kaiser in the events which led to World War I. See, e.g., MAGNUS, *KING EDWARD THE SEVENTH* 211-13 (1964). The personal connections of European royalty could, and often did, on the other hand, have cohesive effects as well.

²² *Id.* at 170. Many of the royal wedding guests at the 1881 wedding of Queen Victoria's grandson, that same "Willie," to Princess Augusta of Schleswig-Holstein-Sonderburg-Augustenburg went on to the funeral of their assassinated kinsman, Tsar Alexander II of Russia. *Ibid.* This is another reflection of the hazards of government by inherited personal power.

place only if subjective perceptions continue to be made unilaterally by states. In the case of a treaty which provides for a suspected violation to be turned over to a third party for less subjective findings of fact, the cycle may be broken right at the start. It is far too seldom realized just how important such a development is in averting armed conflict, for the emphasis in evaluating fact-finding can be placed too exclusively on whether the protagonists *accept* the findings rather than on whether the process of third-party fact-finding has itself stopped a cycle of clash and counter-clash from reaching ever-heightened levels.

At the second stage, when X formulates its demand, quite significant changes have taken place which foretell a radically different world by 1992. The first of these changes lies in the much smaller degree of latitude X may now have to formulate its demands unilaterally. Perhaps the most dramatic illustration of this is at the bilateral level where the arch antagonists of 1870, 1914, and 1939 — Germany and France — have agreed to mutual consultation on foreign policy.

The second change at the demand stage is the proliferation of multilateral bodies which can be asked to consider X's charges before they lead to a definite demand. The dynamic difference in the world we are structuring here lies in the fact that a nation will be afforded a new alternative when it perceives itself insulted or its rights violated — when the strongest of pressures exist for the nation to take some action. This tension, if you will, can be dissipated by making some demand, but it can also be reduced by taking some affirmative action such as putting the matter onto someone else's table. In one case, the dispute remains within the perilous cycle of the world of 1882-1917, merely waiting for Y's response to spring taut the tensions once again.

The crux of the difference in the second case for the world of 1992, is that the cycle is broken — again, regardless of whether the international body more objectively appraises the situation as one for minimal action or not.

To illustrate the changes so far foreseen, let us suppose that in March of 1992, a presidential election year in the United States, in order to meet its radically increased commitments to as many as ten sets of development banks and loan funds in developing regions²³

²³ This figure is based on the projection by Georges Landau of one plausible set of regions and sub-regions, of which the developing ones are: (1) Africa, North of the Sahara, (2) Africa, South of the Sahara, (3) Central Asia, (4) South Asia, (5) Southeast

the United States imposes a special levy of ten percent on all imports.

In the pre-1917 world, such an act would have been examined by each nation acting alone, seen as a violation or as a justifiable emergency measure by each nation alone, and acted upon unilaterally by each alone. This age was one in which diplomats and international lawyers were, as the contributors point out, torn by visions of what could be done with a veritable "concert" of Europe or a Perpetual Union of American States and yet were grated hard against certain inflexible concepts. The concept of "absolute sovereignty" is perhaps the most familiar. What may not be so familiar is the fact that, far from providing greater freedom of action, this myth locked diplomats into habits and cycles of interaction which were, as Michael Barkun points out in "Bringing The Insights of Behavioral Science to International Rules," divorced from the empirical world. In fact, the major option open under that system was the freedom to remain a prisoner of one's own isolation. In our hypothetical, for instance, each country's rulers could decide between a demand for recall of the ten-percent duty, retaliation, or both. Indeed, it was this kind of world that piled up the tariff barriers between World War I and World War II.

C. *The Consequences of New International Organizations*

In 1992, on the other hand, by merely continuing existing organizations, an undoubtedly far too conservative premise, we may expect to see the protesting countries in our hypothetical bring their claims and discussions of alternative courses of action to several of the following bodies:

ECOSOC²⁴

General Assembly²⁵

Secretary-General²⁶

GATT²⁷

Asia, (6) Mexico and Central America, (7) Caribbean States, (8) Pacific Andean States, (9) River Plate Basin States, and (10) Brazil.

²⁴ The Economic and Social Council of the United Nations is one of its six principal organs and has twenty-seven members, nine of whom are replaced by election each year.

²⁵ The "parliament of nations," in which matters of world concern may be taken up for discussion, for recommendation, and, as is not so frequently realized, for reference of legal questions to the World Court by requests for "advisory opinions," is composed of 124 members.

²⁶ The Secretary-General, as the person elected by the nations of the world to preside over the international civil staff of the Secretariat, has come to enjoy increasing confidence, especially to provide low-publicity channels of communication, even between enemies, as is exemplified in the roles of Dag Hammarskjöld in securing the release of American airmen from Chinese People's Republic prisons and of U Thant in averting precipitate action during the Cuban missile crisis. The most recent use of this new chan-

IMF²⁸OECD²⁹Afro-Asian Bloc³⁰OAU³¹OAS³²NATO³³UNTAB³⁴IBRD³⁵Council of Europe³⁶WEU³⁷

nel to break the bilateral confrontation cycle was in King Hassan II of Morocco's appeal to U Thant to investigate how to halt the Algerian-Moroccan arms race. N.Y. Times, March 3, 1967, p. 3, col. 1.

²⁷ The General Agreement on Tariffs and Trade, whose member states agree to extend to all other members any tariff concession negotiated with any GATT member, was composed of seventy-two members as of April 14, 1967. Its members account for over eighty percent of world trade. SHIMM, BAADE & EVERETT, *EUROPEAN REGIONAL COMMUNITIES* 213 (1962).

²⁸ The International Monetary Fund guards against nationally fatal currency crises through, *inter alia*, gold or hard currency credits and is thus concerned with measures motivated by a critical imbalance in the flow of gold, as in our hypothetical. Further, if a trade measure can arguably be characterized as a prohibited exchange control, an interpretation dispute may arise for referral to the Board of Executive Directors or, on appeal, to the Board of Governors. The IMF is headquartered in Washington, D.C. and has 106 members.

²⁹ The Organization for Economic Cooperation and Development, formed to achieve the highest sustainable economic growth among its members, is headquartered in Paris and establishes working parties to look into specific disputes among its twenty-three members.

³⁰ This is an informal group of states whose delegations currently meet weekly during the months when the General Assembly of the United Nations is in session.

³¹ The Organization of African Unity has an annual assembly and a Council of Ministers meeting twice a year. The OAU is headquartered at Addis Ababa and is composed of thirty-six members.

³² The Organization of American States is headquartered in Washington, D.C. and has twenty-three members, the latest to join being Trinidad and Tobago. Cuba is a member state whose government has been suspended since 1962 from participation in meetings. A smaller, but similar, forum exists in the Organization of Central American States (ODECA) which has headquarters in San Salvador and five members: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

³³ The North Atlantic Treaty Organization has headquarters at Casteau, Belgium, and fifteen members. It is little known that NATO also sets up working parties on non-military disputes that might threaten cooperation among its members.

³⁴ The United Nations Technical Assistance Board, set up by Secretary-General Dag Hammarskjöld to coordinate United Nations assistance programs, is composed of the Secretary-General plus the heads of all the inter-governmental agencies, such as the Food and Agricultural Organization (FAO), the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), the International Finance Corporation (IFC), the World Meteorological Organization (WMO), and the head of the new combined Development Fund.

³⁵ The International Bank for Reconstruction and Development, usually called "the World Bank," plays a large role in major aid and development projects and even in mediating disputes, such as the Indus Waters dispute between Pakistan and India. The IBRD is headquartered in Washington, D.C., and has 106 members.

³⁶ The Council has headquarters in Strasbourg and is composed of eighteen members. Delegates to its annual Consultative Assembly meeting vote as individuals and not as government representatives.

³⁷ The Western European Union includes the Common Market Six, see note 41 *infra*, plus the United Kingdom, and has met quarterly since 1963 at its headquarters in London.

Nordic Council³⁸
 COMECON³⁹
 EFTA⁴⁰

EEC⁴¹
 LAFTA⁴²
 Commonwealth Conference⁴³

When those states expecting to be harmed by the new ten-percent duty bring their claims to an international organization in 1992 they will be acting in a world vastly removed from that of 1892 in several ways. First, the confrontation cycle will be broken at the earliest stage. Second, the tension of perceived threat will be partially dissipated by the act of each state laying its claim on some collective table. Third, in Professor Barkun's terms, through the continuing interest each country has in the benefits it gains from a particular organization, it develops "a vested interest — both material and emotional — in a minimal level of international amity," thus leading it still further away from resolutions based on armed force. Fourth, as Professor Barkun perceptively points out, there can be solutions reached by an international organization in terms of the International Law₁ of one group of nations that might not be obtainable under some broader International Law₂.⁴⁴

³⁸ The Council has no headquarters, although it has secretariats in each capital of its five member states, Denmark, Finland, Iceland, Norway, and Sweden. Within the five-country area, passport requirements for Nordic Council citizens have already been abolished, traffic rules are being unified, social security is obtainable reciprocally, and joint research and other cooperation is proceeding at an accelerated pace.

³⁹ The Council for Mutual Economic Assistance is headquartered in Moscow. Its eight members include Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolian People's Republic, Poland, Rumania, and the Soviet Union.

⁴⁰ The European Free Trade Association, sometimes called "the Outer Seven" has headquarters at Geneva, and seven members plus one associate: Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom, plus Finland. The significant difference between action taken by the "Seven" and by the "Eight" is that, if Finland will not be affected by a decision, the question is brought up in the EFTA Council, whereas if Finland will be affected, it is brought up in the "Joint" or "Finn-EFTA" Council.

⁴¹ The European Economic Community, often called "the Common Market" or "the Six" has most of its administrative headquarters in Brussels; however, a few, plus the Court of Justice of the Communities, are in Strasbourg. The six members, Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands, are joined by twenty associate members and thirteen associated overseas territories.

⁴² The Latin American Free Trade Association is headquartered in Montevideo and has nine members: Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, and Uruguay. This is representative of several regional economic organizations currently taking on new responsibilities. In Asia, for example, our hypothetical dispute might now appropriately be discussed in the new Asian Development Bank, the Asian and Pacific Council at its ministerial meeting, or the Association of Southeast Asia (Malaysia, Philippines, and Thailand).

⁴³ The Commonwealth Conference has no official headquarters, but there has been a Commonwealth Secretariat at Marlborough House in London since 1965; as of November 29, 1966, with the entrance of Barbados, there were thirty-seven members. See N.Y. Times, Nov. 6, 1966, § 20, p. 19, col. 1.

⁴⁴ The idea of using "cow₁" plus "cow₂" instead of "a cow" or "two cows" for a

D. *The Consequences of Regionalism and Plural Values*

This pluralism is already with us. In several of the international organizations listed for our 1992 hypothetical, the question of an actual ten-percent surcharge to be laid upon imports by the United Kingdom in a balance-of-payments emergency was in fact raised in 1966. London was bound by its GATT treaty obligations⁴⁵ not to raise listed duties; furthermore by actions taken communally under the convention establishing the European Free Trade Association (EFTA),⁴⁶ the state was even treaty-bound to reduce duties on many goods from the other states of the "Outer Seven."⁴⁷ If the unusual emergency measure to be taken were scrutinized by each party to these two treaties strictly from the point of view of whether it would violate their express terms — the traditional pattern of analysis under the old single body of rules International Law¹⁹¹⁷ — violations would have been found by at least some states, and many cycles of confrontation would have started.

In fact, what arose among the GATT and EFTA states was an *ad hoc* international rule defining the conditions under which the United Kingdom's action would not be a violation. As Professor Barkun points out, the new pattern of analysis is now an *information-seeking* process which aims to uncover the less abstract, and hence more rational, specific views of fellow governments in the same regional, treaty, or charter community. In the 1966 case, the commonly held views of the GATT-EFTA states, International Law^{GATT-EFTA}, were quickly disclosed, and the United Kingdom was permitted to keep the ten-percent surcharge until November of 1966.⁴⁸ The key to this non-cycle result was that the proliferation of organizations by 1966 had already provided many forums, such as the meetings of the EFTA and Finn-EFTA Councils,⁴⁹ in which a common approach or rule could be advanced.

more precise use of language is that of Professor Korzybski. See Korzybski, *Extensionalization in Mathematics, Mathematical Physics, and General Educational*, in *GENERAL SEMANTICS* 31 (Baugh ed. 1940). Its use here to describe different international laws is the editor's way of presenting Professor Barkun's notion that norms or rules may exist for the community at large, as in the rules of diplomacy, or merely for regional or other groups throughout which they are held in common.

⁴⁵ See note 27 *supra*.

⁴⁶ See note 40 *supra*.

⁴⁷ Compare the "quantitative restrictions" which could have been introduced under Article 19 of the Convention establishing the European Free Trade Association to safeguard the United Kingdom's balance of payments. See generally *BUILDING EFTA* 89 (1966). For a discussion of the "Outer Seven," see note 40 *supra*.

⁴⁸ See *EFTA REPORTER* 7 (Nov. 21, 1966).

⁴⁹ See, e.g., report of the discussions at the Bergen meetings of May 12-13, 1966 in *id.* at 1 (May 23, 1966). For a discussion of the Finn-EFTA Council, see note 40 *supra*.

By analogy to the instant pudding made by simply adding milk to a flavored powder, this new process has been referred to as "instant international law." There is no more need to be alarmed at the speed with which new rules can be proclaimed than there is to be alarmed at the notion of several sets of international rules. First, as Professor Barkun points out, the increased speed of communication which permits such instant formulation has come to us at a time when we are better able to use that speed to supplement the decision-making process with far more data about technical facts, *e.g.*, was the United Kingdom facing an economic emergency, and social attitudes, *e.g.*, was continued EFTA and GATT cooperation of overriding importance for all concerned, than had ever been possible in 1892.

Second, like the possibility of plural sets of international rules, the possibility of swift consensuses in communities of states is not new. For example, the Vienna Powers, acting in congress, were able to agree in their Act of June 9, 1815, that the securing of civic rights for Jews in the new German Confederation was a matter of international, not just local, concern.⁵⁰ It was not the speed with which this decision was reached, but the speed with which the habit of acting in concert vanished that is of concern here. Indeed, the collective consultation and action of the Vienna powers broke down at Aix-la-Chapelle in 1818 when a parliamentary British government could not publicly subscribe to the keystone principle of this International Law Vienna, namely, that successor kings must be consistently confirmed and kept in their dominions at home and overseas by collective armed force.⁵¹

Third, more instant law and more sets of norms or rules go

⁵⁰ See SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 15 (1964).

⁵¹ The British position at Aix-la-Chapelle in 1818 remains remarkably relevant to the 'several international laws' question of 1967 and 1992:

The idea of an "Alliance Solidaire" by which each State shall be bound to support the state of a succession government, and possession within all other States from violence and attack, upon condition of receiving for itself a similar guarantee, must be understood as morally implying the previous establishment of such a system of general government as may secure and enforce upon all kings and nations an internal system of peace and justice. Till the mode of constructing such a system shall be devised nothing would be more immoral or prejudicial to the character of government generally than the idea that their force was collectively to be prostituted to the support of established power without any consideration of the extent to which it was abused. WEBSTER, *THE CONGRESS OF VIENNA 1814-1815*, at 171 (5th ed. 1950).

hand in hand. A world of foreign ministers constantly meeting in several organizations permits groups of nations which are ready to act upon special norms they have come to (or are willing to) share to live by those rules without waiting for any broader consensus. An excellent illustration of this is in the human rights area which concerned the Vienna powers a century and a half ago. In the more recent example of the European Convention for the Protection of Human Rights, discussed by Edward Wise, fifteen Western European nations were willing to subscribe to norms of behavior which governments must follow in dealing with their own citizens. Further, they were able to agree on rules so detailed as to preclude socialist states from joining them, at least as long as they adhere to present Eastern European practices.

For example, the right to be informed upon arrest of the charges against you is now deemed part of the common minimum standard for almost all Western Europeans.⁵² The fact that, of the signers the French government alone refused to ratify this convention may speak volumes about its readiness, or lack of it, to accept the norms of that community, or what we might call International Law _{WE}. In this case, the non-Frenchman in Western Europe gains something quite tangible from both the instant law of the convention and the fact that a special set of communal norms about how governments must treat their own people *can* be created and enforced without waiting for unanimity to develop throughout the continent, let alone the whole world.

It is this obvious advantage of plurality that has led Professor Wise in his "Steps Toward the Advancement of Human Rights" to predict expansion of regional schemes for human rights enforcement. Neither this nor Professor Barkun's predictions of plural systems of less-than-universally shared values rules out the simultaneous development of planet-wide values. Indeed, we can expect by 1992 both increased codification of universally held world rules, such as rules on peaceful use of outer space — what we might call International Law _U — and increased developments on the regional level, such as the following possible sub-groups of rules: (1) the

⁵² Compare the broad consensus expressed by the Committee on Criminal Law of the Congress of Athens in 1955 in its "Fundamental Principles of Penal Law," Resolution I, principle 1(a):

Every accused must have at least the right: (a) to be immediately informed, on all points and in a language comprehensible to him, of the nature and the grounds of the charge brought against him. INTERNATIONAL LAW COMMISSION, THE RULE OF LAW AND HUMAN RIGHTS 23 (1966).

European human rights area; (2) the Latin American human rights area; (3) the South Asian human rights area; (4) the French African human rights area; (5) the English African human rights area; (6) the East European human rights area; (7) the China trade and rights area; (8) the European free trade and market area; and (9) the OECD liberalization and rights area.

E. The Growth of Global Problems and Solutions

It is obvious that some areas for rule-making properly belong to the universal level rather than to the regional ones. In this category are rules for the peaceful use of Antarctica, or those for nuclear development. What may not seem so obvious at the moment is that, by 1992, many seemingly regional problems, such as fisheries management, will be global ones, if they have not indeed already become so. For example, if by 1992 only the top fifteen fishing nations of today come to possess fleets able to fish anywhere in the world, we can expect to see, in the fishing grounds of the Indian Ocean, the Humboldt Current off Chile-Ecuador-Peru, the Gulf Stream, the Newfoundland Grand Banks, the Kuroshio Current off Japan, the Alaskan Current, and the North Sea, competing ships from every single region.⁵³ The consequence for international law is easily deduced: global exploitation will require global regulation.

Like the problem of regulating fishing, if there are to be fish populations around to be caught in 1992, better technology for presently developing nations plus greater mobility will mean not only more frequent contacts with the established nations but also wider ones, calling in turn for universal rules in many areas subject today merely to national or regional codes. For example, some aspects of world trade, such as the terminology used by customs officials which currently exhibits a clash between United States pigeonholing and that of Brussels Rules states, may have reached

⁵³ The fifteen top fishing nations are: Peru, China (mainland), Japan, Soviet Union, United States, Norway, India, South Africa and Southwest Africa, Canada, Spain, Chile, Denmark, United Kingdom, Iceland, and Indonesia. For the legal implications of future developments in fishing techniques, see generally Wilkes, *The Uses of Resources Without Conflict and New Rules for International Law — Myths About the Width of the Territorial Sea*, 42 WASH. L. REV. (1967) (forthcoming). For the twenty-one nations landing annual catches over 500,000 tons in 1965, see 28 COMMERCIAL FISHERIES REV. 55-56 (Jan. 1966). Much of the credit for current efforts to forge a modern law of the oceans belongs to Professor Myres McDougal of the Yale Law School who has consistently warned against inherited "mischievous concepts" in this area based upon "irrational geographical compartmentalizations." See, e.g., McDougal, *Forward to JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES* at vii (1965).

the point where our smaller world appreciates the value of a consistent trade rule anywhere you buy or sell on the planet.

This is indeed one possible development foreseen by trade law specialist Robert Goldscheider in "Encouraging the Flow of Goods and Know-How Among Nations — The Role of Industrial Property Rights and Antitrust Laws." Mr. Goldscheider traces three trends toward the growth of global solutions in this field. First, he points in the trademark area to the roots of a universally accepted mark in the 1883 Paris Union, since grown to cover seventy-six nations. Second, he points to the effectiveness of patent safeguards in the regional reconstruction which followed World War II, thus providing historical experiences to support movements for a Europe-wide or world-wide patent by 1992. Third, he points to the clash developing between industrial property protection and antitrust policies, the question being whether the use of universal trademarks and patents may tend to stop trade at national borders. Here, Mr. Goldscheider's spotlight on the growing acceptance around the world of the value which enforceable antitrust rules can hold for a planet of consumers may well have pinpointed one of the major new areas for global rules in 1992.

Just as a single rule for trade anywhere on the planet can reduce frictions in business, so too in conduct among nations, some of the frictions which might lead to armed clashes can be reduced by gradually adding to the body of universal or world rules. Indeed, under the United Nations Charter, the work of the erudite and respected jurists on the International Law Commission to codify this International Law^U has been proceeding slowly; however, in 1967 one can report that the Commission's work, especially in the area of the law of treaties, has reached a much faster pace. Therefore it is reasonable to expect that by 1992 the body of codified world rules will cover not only treaty law but also, this editor would hazard to guess, such new areas as any of the following: (1) duties when alleged Arms Control violators are found in a host state; (2) functional sources of international law; (3) conditions for recognition of revolutionary governments; (4) succession to treaty rights and duties where the system of government is radically changed; (5) resolving disputes in joint ventures to exploit resources where one party spurns methods already agreed upon; (6) rules of evidence before international tribunals; (7) overflight by satellites, meteorological devices, space stations, high-altitude planes, passenger or freight rockets, especially when landing or return orbits are

involved; or (8) obligations to consult informally before launching a protest, a refusal to perform, or a retaliation, based on another state's alleged breaking of world law.

F. Finding Facts as a Way To Halt Resort to Force

The biggest mistake one could make in looking at this world of 1992 would be to assume that greater agreement on local and global rules will cut out most disputes. Because our Century began in 1892, many, if not most, of the rules involved in international disputes were never themselves contested by the parties. What has been most frequently the source of friction has been some difference in the views parties have taken of the facts to which those rules should be applied.

A prime example of this in 1967 recurs in the periodic flareups over the status of Berlin. The legal principles involved are common to all sides, as a survey of but a few of them will show. First, it is agreed that a treaty should be performed according to its terms; international lawyers have known this under the rubric of *pacta sunt servanda*.

Second, no state contests that the four-power agreements for Allied control of Berlin were binding pacts within the meaning of that doctrine. It is worth noting that this in itself reflects a major change between the world of 1892 and that of today. In the older one, most agreements between states were reduced to a treaty with all the delay which formal ratification entailed. In 1967, however, there are so many things concerning which some of the over 130 governments must reach agreement that it is not defeasible to wait, for instance, the almost three years it took to ratify the consular treaty of June 1, 1964, between the United States and the Soviet Union.⁵⁴ Among the hundreds of executive agreements which the United States government makes each year, aside from the notable migratory bird agreement with Canada held binding on all of the states in *Missouri v. Holland*,⁵⁵ there are agreements on: airline landing and pickup rights, investment guarantees, trade fairs, nuclear laboratories, cultural exchanges, Peace Corps volunteers in fifty-three countries,⁵⁶ tariff reductions, East-West trade, aid missions, scientific rockets, and the like.

⁵⁴ See N.Y. Times, March 17, 1967, p. 1, col. 1; N.Y. Times, April 1, 1967, p. 1, col. 2 & p. 11, col. 1.

⁵⁵ 252 U.S. 416 (1920).

⁵⁶ As of August 1967, per President Johnson's letter transmitting the Fifth Annual

Third, no state in the Berlin affair disagrees that, under certain circumstances, the failure by one party to live up to its treaty obligations excuses the other parties from performing. Lawyers think of this in contract law in terms of "excuse for nonperformance" following a "material breach." The international law rules appear to be quite similar with the exception of one possible refinement: at various times, states have argued that when the basic facts upon which a treaty was predicated have significantly changed, the treaty itself is no longer valid — this doctrine has gone under the rubric of *rebus sic stantibus*. For example, without expressly adhering to this doctrine at all, the Soviet Union has in fact adopted both approaches in the Berlin affair. It has alternatively argued that the right of air access to Berlin granted under an Allied Control Council agreement of November 30, 1945, is void either because the United States, France, and the United Kingdom abused these rights or because with the breakdown of four-power unanimity, the supposition underlying the original arrangement fell by the wayside.⁵⁷

Since the United States has also used these principles of non-performance and *rebus sic stantibus* in international disputes, the legal dispute over Berlin's status actually turns upon factual questions such as these: Who breached first? Was the breach material in an exculpatory sense? Was the fact of four-power unanimity really assumed to be the keystone for continuance of the 1945 agreements? Has the factual situation in the 1960's become so changed that these arrangements can no longer be binding at all? In this respect, the Berlin affair is far more representative of the international disputes to be expected in 1992 than, say, the *Oscar Chinn Case* in which the World Court was asked, *inter alia*, to interpret the "freedom of trade" clause of the Convention of St. Germain of 1919 regarding rights of access along the Congo River.⁵⁸

In short, as more rules are set down for all countries, we can predict that more disputes among them in 1992 will concern not what the world law is but what the facts of the case at hand are.

Report of the Peace Corps to Congress on March 6, 1967, the sixteen thousand volunteers in fifty-three countries were to be increased to nineteen thousand in sixty countries by August 1968. 56 DEP'T STATE BULL. 529 (1967).

⁵⁷ See "Text of U.S. Note to Moscow on the Air Corridors to Berlin" of September 8, 1961 in N.Y. Times, Sept. 9, 1961, p. 2, cols. 2-6, and "Text of Soviet Rejection" of August 18, 1961 in N.Y. Times, Aug. 19, 1961, p. 2, cols. 7-8; cf. one excuse advanced for closing the East Berlin border and raising the "Berlin Wall" in the period from August 13, 1961, to October 1961 was that crossing rights were used for espionage purposes. N.Y. Times, Aug. 15, 1961, p. 1, col. 8.

⁵⁸ Oscar Chinn Case, [1934] P.C.I.J., ser. A/B, No. 63.

For this reason, one of the most vital areas in the quarter-century from 1968 to 1992 will be the one tackled by Thomas M. Franck, Director of the Center of International Studies at New York University, together with Laurence D. Cherkis, an Editorial Associate at the Center, in "The Problem of Impartial Fact-Finding in International Disputes."

Using Viet-Nam and the Dominican Republic incident as graphic illustrations, contributors Franck and Cherkis paint a picture of the world of today as one in which (1) there may be differences between government and private reporting of crucial events to which international rules are to be applied; and (2) those differences may stem, not from deliberate distortion, but rather from a "profusion of witness" which is coupled with the absence of a credible system for finding facts. The important thing about the factual issues cited — such as where the supplies and direction for the Viet Cong come from — is not so much which "witness" is correct as it is that the 1967 world is still in the process of developing a means for getting "credible" findings of fact to be used in resolving international disputes; a function which partisan sources cannot serve.

This is not to say that impartial finders of fact are new to world law. The authors have surveyed five methods which are in use today, namely, fact-finding by: (1) *ad hoc* missions of the United Nations, such as those to Malaysia, Oman, and Viet-Nam; (2) trusteeship Council missions, and those of the "Committee of Twenty-Four," as when the latter was asked to look at charges of racial discrimination and political suppression in Spanish Equatorial Guinea; (3) missions from regional organizations; (4) non-governmental organizations, such as the Anti-Slavery Society which reported on slave marketing in Saudi Arabia, or the International Commission of Jurists' mission to look into charges of "armed aggression," "flag-ripping," "unwarranted shootings," and "job discrimination" in the Canal Zone Incident;⁵⁹ and (5) national commissions, from the royal commission system to the President's Commission on the Assassination of President Kennedy. While the "cooling off" aspects

⁵⁹ The impartial fact-finding in the Canal Zone in 1964 by three highly respected members of the International Commission of Jurists was of key importance in permitting Panama and the United States to back off from the confrontation cycle begun by shots during a demonstration; they found that (1) the limited firing of the United States soldiers, while fatally injuring several Panamanians, was by no stretch of the imagination armed aggression, although neither was it a use of force warranted by the actual situation; and (2) the felt grievance of the Panamanians from alleged job discrimination was supported by the facts.

of turning a problem over to third parties for investigation, which breaks the confrontation cycle of 1892, are expressly *not* the subject of this particular study, they do recur in it, as in the effect of the United Nations Mission on subsequent tensions between Malaysia and Indonesia, or in the effect of the Organization of African Unity's commission on threatened armed clashes over the Moroccan-Algerian border.

The most important contribution of this survey, however, is in the great number of fresh insights it provides into what makes one impartial finding of fact more credible than another — perhaps the most crucial communication problem in world law today. The authors of this study have thus posed the problem of the next quarter-century in terms of a research proposal which would take these insights and test them, either to provide support for them as guiding principles in the practice of world law⁶⁰ or to discard any one of their hypotheses if it should prove insupportable.

Just how great a difference having a fact-finding mission's report accepted throughout the world could make in 1992 world affairs can be seen by taking hypothetical disputes and applying some devices which might follow from each of the hypotheses.

Suppose that in 1992 — a year when any party to the Antarctic Treaty can propose an amendment which, if rejected, can permit it to withdraw — the Chinese People's Republic, a fledgling party to that Treaty, accuses the United States of using its nuclear reactors in Antarctica to refuel the *U.S.S. Daniel Boone*, a submarine armed with Polaris IX missiles, in what is alleged to be "a most flagrant violation of the Treaty going to the core of trust in peaceful intentions on which the whole Treaty rests" and threatens to airlift two divisions of troops into Antarctica to "provide a safer regime to ensure peaceful use of the Antarctic islands." The State Department issues a release calling the charges "groundless, except that the *U.S.S. Daniel Boone* entered in distress and was helped to repair its propeller by a scientist from the Central American Union."

As developed from the hypotheses of Messrs. Franck and Cherkis, either the Antarctic Treaty Powers or the Security Council would, in addition to any precautionary measures taken, seek a mission of impartial men and women to get at the facts. The choice of the type of mission, its scope, its procedures, and its composition would take into account research done between 1968 and 1992 on the effectiveness of various kinds of fact-finding missions.

⁶⁰ Compare a similarly valuable study of principles for negotiation proposed by former ambassador, now Professor, Arthur Lall of Columbia University in LALL, MODERN INTERNATIONAL NEGOTIATION (1966).

This research would have included, first, studies of *changes in attitude* brought about by alternative kinds of missions, such as the degree to which certain attitudes of the people in one state toward another state's intentions or motives were altered — as evidenced, *inter alia*, in the editorial positions taken by national journals. Second, it would have included historical and psychological studies on the strength of the correlation between various fact-finding methods and *changes in behavior*, which reflect the degree to which those facts were accepted. Third, studies would have been undertaken which *compared similar situations* in one of which a particular way of finding facts was used that was not utilized in the other.

What we could expect to discover happening in the hypothetical might be the following. First, the Security Council might reject the temptation to be the body to appoint finders of fact here if the presence of one or more of the disputing parties on that Council might weaken from the start the faith of some party in the appointing authority. Perhaps the Secretary-General would pick men whose professional and popular esteem augurs best for widespread acceptance of their report. This team in turn would set up a means of taking testimony, preferably in Antarctica at some point, aimed at hearing all major witnesses.⁶¹ The team would also hear both the United States and the Chinese People's Republic in open sessions, allow summaries, and permit counsel from both sides to rebut testimony and to cross-examine. The team might begin by informally securing assurances that the disputants would not attempt to guide its inquiries or make public statements likely to commit themselves irretrievably to an inflexible view of the facts. Finally, the team will attempt in its final report to reflect its thoroughness, including its findings on essential subsidiary facts, its logic and its knowledgeable approach with the greatest unanimity on findings that can be reached under the circumstances. Such a process of impartial finding of fact will be expensive, as indeed was the Warren Commission whose findings on the assassination of President Kennedy are evaluated as to credibility by our authors. But courses of action like wars, peace forces, police actions, or mobilizations are extremely expensive alternatives to findings of fact backed by maximum chances of credibility, something needed most in the very situations in which resort to force of arms most threatens to occur.

The credibility of facts found is a pivotal factor in the fashion-

⁶¹ Query: Does such a need for completeness in the investigation point also to a need for some limited international subpoena process by 1992?

ing of an ordered world. Indeed, one might speak of it as the problem of the "authority" of fact-finding, for facts found by means that foster credence in them possess an authority very much akin to, and often even greater than, that which we ascribe to national and international bodies.

Messrs. Franck and Cherkis make what is perhaps the most dramatic demonstration of this when they compare the widespread acceptance, despite individual critical attacks, of the findings in the report on the assassination of President Kennedy with the absence of like world-wide acceptance of officially found facts which would support a given legal position of the United States in the Viet-Nam incidents. The question raised is whether this disparity reflects the use of impartial, exhaustive, scholarly, and prestigious finders of fact in the study made by the Warren Commission.

It is easy to dismiss the difference as reflecting desires to discredit the United States government for its presence or conduct in Viet-Nam. It is just as easy, however, to ascribe this difference to emotional revulsion at reports that a government with a 190-year history of defending liberty, engages in "kill counts" and "strafing and bombing techniques which do not avoid unwarranted maiming of civilians." Yet, suppose we assume that the official presentation of the facts is the accurate one, and that most of the international law positions based on those facts are thus factually supportable, the failure of South Viet-Nam and its allies to refer disputed questions to less partisan fact-finders is, nevertheless, fatal to the breadth of the authority of the facts officially reported. One has only to pick up any newspaper outside the United States to see the compelling need for more authoritative findings — as could readily be provided, for instance, by a requested report from the International Committee of the Red Cross in Geneva on detailed questions about military conduct, plus one from a royal commission on the political facts — if the allies' position is to receive more widespread support.

The problem is not the absence of findings, for there is a plethora of witness, it is that these findings exhibit, evidently, none of the real authority that comes from impartiality, thoroughness, access, and prestige, in any way close to that of the Warren Commission's report. The added tragedy — to the extent that the world of 1950 to 1967 has been a bipolar one and to some lesser extent the world of 1968 to 1992 may remain one — is that continued stability depends in part on the authority of official representations

which must, from time to time, be buttressed by impartial corroboration from without.

G. The Rise of Transnational Man

Another clearly visible change between 1892 and 1967 has been the growth of a class of persons whose work, business, scholarship, or humanitarian activities puts them down in another country for some period of time. Three new characteristics have emerged as this group has grown in number by leaps and bounds.

First, it is no longer a class predominantly made up of the very wealthy. Here are to be found a Dutch electrical engineer working on a powerhouse in Iran; a Food and Agriculture Organization (FAO)⁶² fisheries expert from Taiwan advising farmers in Louisiana on fish stocks for rice paddies; a Saudi Arabian driller manning an oil rig on the continental shelf off Malaysia; a teacher of Spanish from Mexico City spending a year in Spain to work on her book; a French architect supervising a public housing project in Quebec; a salaried executive from a Japanese electronics firm manning its new factory in Ireland; or a young lawyer from San Francisco doing drafting work for an understaffed ministry in East Africa. These, not the playboys of the western world, will be the men filling six-hundred-seat hypersonic planes travelling at five thousand miles per hour by 1992.⁶³

Second, many in this class are now in occupations which will keep them moving about the world for much of their productive lives. Here are to be found the Canadian construction foreman specializing in huge dams; the biologist from Kerala specializing in regeneration research; the transportation specialist from Australia listed on the United Nations roll of 300,000 civilians willing to staff government posts abroad, called "OPEX"; the German industrial engineer in the foreign operations division of a world-wide firm; or the Cleveland attorney advising on international licensing agreements.

Third, members of this class move about a world which is their environment; they expect to be asked to live by the laws of the host country; and, in return, they expect those laws to be reason-

⁶² A United Nations organization having 111 members. See also note 34 *supra*.

⁶³ The six-hundred-passenger planes are already under contract for delivery in the 1970's; the first high-altitude scramjet engine, designed ultimately to provide passenger plane speeds of 5,000 m.p.h. and military speeds of 8,000 m.p.h., has already been tested. See N.Y. Times, Jan. 13, 1967, p. 3, col. 1. The term "hypersonic" is used for speeds over five times the speed of sound, or roughly 3,300 m.p.h. at high altitudes. *Ibid.*

able. What will be "reasonable" in this context is not an exact sum of expectations brought from previous countries and jobs; it is, however, something more than those reduced expectations which historical accident may have created in a given spot. A Frenchman might be ready, for instance, to adjust to the notion of an American criminal hearing at which, not the judge but the prosecutor questions the witness, yet he would be horrified to learn that in some states his attorney cannot see that prosecutor's dossier against him.

In 1892, the analogous posts may have been held by colonial civil servants who remained within the cultural expectations of their mother countries. In 1967, this has become a much less common phenomenon as colony after colony has gained its independence. By 1992, this "trans-national man" will be operating entirely in non-colonial territories. Thus, he will need to have some minimum floor of human rights which he may expect to have honored in his relations with officials and policemen. To the extent, too, that his business itself is trans-national, he will seek to have more common rules for doing business plus more general regulations to tell him what he may or may not do. These expectations will add to rising domestic pressures for more widespread rules in these two areas.

H. Creating Liberty Under Law

Each of the three contributors who deal with human rights stresses the pivotal era entered in 1967. World law has reached a juncture at which it has been firmly established that the individual can be a subject of international law.⁶⁴ Robert Bloom, Secretary of the International Criminal Law Commission of the World Peace Through Law Center, demonstrates that holding individuals responsible for violations of international law and giving them redress if it is violated go hand in hand. In "Steps To Define Offenses Against the Law of Nations," Mr. Bloom explains that the attention focused upon the individual by the growth from 1892 to 1917 of state responsibility for the treatment of aliens in turn supported an expansion of criminal responsibility for individuals, such as war criminals, who violate community law.

⁶⁴ See generally the comprehensive data collected in GORMLEY, *THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS* (1966); cf. the ease with which the right of individual petition was accorded those in trusteeship territories by the drafters of the United Nations Charter, discussed in Huston, *Human Rights Issues of the United Nations Conference on International Organizations*, IOWA L. REV., June 1967 (forthcoming).

Where will this consciousness of international individual liberty take us by 1992? Mr. Bloom points to several predictable trends that will shape that era. First, the number of international offenses will itself be increased. Just as genocide has been added to piracy, slave trade, narcotics traffic, forced labor, and traffic in women, so too one can anticipate some existing areas of international crime to be more precisely spelled out, as, perhaps, in the area of war crimes. Second, following Mr. Bloom's prediction of new types of offenses, we may look for international criminal responsibility in fields of law not yet touched. This may be through some universal need related to world survival, as in the case of individuals who violate arms control agreements. On the other hand, this may be through some felt regional need to have business practices held to a common standard, as in the case of trans-national monopolists.

The world of 1967 already has, as Mr. Goldscheider points out, the international antitrust law of the Common Market. Under its rules, a French businessman may be fined one million dollars for an agreement with his Swiss competitor to divide up French and German markets. Further, in the period from 1968 to 1992 we can also expect, so long as some of the "Outer Seven" are not joined with the "Six," greater implementation of EFTA commitments to eliminate harmful restrictive practices.⁶⁵ Finally, we can expect to see, as the integration foreseen by Mr. Landau among the developing states proceeds, other regional authorities turning to unjust restraints in their areas. It is far from unreasonable to expect, therefore, that in the world of 1992 there will be many regional codes of unlawful business behavior and possibly even a single world-wide set of offenses which are so outrageous as to be universally condemned, *e.g.*, selling below cost with the intent and effect of driving another out of business.

The economic "rights" of Enterprise *A* to compete with Enterprise *B* on fair terms are increasingly safeguarded today, not because most governments are in the hands of business interests, but because consumers pay less for better goods on the whole when *A* and *B* can strive equally for their custom. This strong concern with obtaining the greatest happiness for the greatest number, as Jeremy

⁶⁵ Every state in EFTA has had, since January 1965, some form of law against monopolistic practices. See LAMBRINIDIS, *THE STRUCTURE, FUNCTION AND LAW OF A FREE TRADE AREA* 127 n.42 (1965); permanent EFTA-wide restrictive practices rules are intended to follow an experimental period. *Id.* at 122. For a discussion of the "Outer Seven," see note 40 *supra*. For a discussion of the "Six," see note 41 *supra*.

Bentham put it in the nineteenth century,⁶⁶ is at the heart of changes since 1892 to keep both business and government from proceeding without restraint at the expense of the man in the street, as Professor Wise points out in "Steps Toward The Advancement of Human Rights."

In tracing the shifts in international protection that have taken place, Professor Wise perceptively reviews the 1892-to-1917 period and shows that the nineteenth century already had "a cautious but conscious program of reform" in human rights. The program embraces, first, treaty guarantees, such as the guarantee of tolerance for religious minorities found in "every major peace treaty"; second, diplomatic protection, already linked, as Professor Wise points out, to acceptance of the idea that there were "ordinary standards of civilization" open to any international tribunal to apply; and, third, humanitarian intervention, which likewise assumed that gross abuses of such standards were "self-evident."

Professor Wise also finds much to explain the United Nations' commitments to human rights today in such earlier contributions as: the International Labour Organization's work since the Berne Conference of 1906; Leonard Woolf's *International Government* published in 1916; and the Declaration of the International Rights of Man of 1929. All three accepted as a premise the notion of international human rights; all three accepted as a goal that they should be codified and ultimately become enforceable; and all three saw a large role in this process for the international organization, whether public or private.

This then is the role that we can see carried to some intermediate fruition by 1992, if, as Professor Wise warns, we do not permit the present need to emphasize racial inequality to divert us from the longer-ranged problem of ranking human rights values so as to give priority to procedural protection for individuals.

I. Regional Integration: A Way Out of the Development Dilemma?

The Brazilian jurist Georges Landau makes a significant contribution with his analysis of the plight of the developing regions, as exemplified in Latin America. His summary of accusations common in his region is as valuable for what it tells us about the picture in 1992 if integration does not become an accomplished fact,

⁶⁶ The philosophical concept is known as hedonism and is discussed in relation to morals and legislation in *THE WORKS OF JEREMY BENTHAM* 17 (Burton ed. 1843).

as it is for what it says about foreseeable attitudes in what Secretary-General U Thant has called the "have-not" nations of the southern hemisphere and the "haves" of the northern one.

First, the feeling of powerlessness before world giants will become deeper if the gap between industrial and less-advanced economies continues to widen. Second, the African links with the European communities restored industrially by the Marshall Plan will be further strengthened at the expense of continued tariff handicaps for goods from Latin American states left in isolated bargaining positions. Third, mining of deposits under the continental shelves and new plantings in the arid or untouched lands of other continents could lead to lower per capita revenues from exports of raw materials. Fourth, the terms of trade could remain over-weighted in favor of countries buying these raw materials and selling back higher-priced industrial goods, thus continuing recurrent economic crises.

If to raise this specter is in some way to speed present commitments toward integration, Mr. Landau's warning may well be heeded before 1992. He has framed his study both in terms of the problems of past gaps between ideals and achievements and in terms of the existing institutions from which something more positive may emerge. Perhaps most significant of all are Mr. Landau's reasons for believing that once the basic commitment to integration is matched by the will to achieve it, Latin America and, one might hypothesize, analogous developing regions, may be in an even better position in some respects than were the six Common Market countries of Europe in 1957.

J. An Alternative World for 1992

In the same prophetic character as was George Orwell's 1984 is Aaron Danzig's "Meeting Demands for Action as a Community of Nations." Here we find an assessment of the League of Nations' failures and the United Nations' beginnings in three major categories: peace-keeping, aid, and human rights. If we assess the point we have reached in 1967 honestly, says Mr. Danzig, we have to admit the following. First, United Nations peace-keeping "hit its all-time high in 1956" in the Suez crisis and has since been hamstrung in effectiveness by its members' inability to reach unanimous agreement on reliable methods for financing future operations. Second, we must face up to the fact that national programs, like United States bilateral aid, still run up to 4.5 billion dollars a year,

while the United Nations' own budgets remain at approximately 200 million dollars a year. Third, we have yet to see whether United Nations sanctions will work to make human rights meaningful in Rhodesia or South Africa and how many states will ratify the implementing protocol to the new International Covenant on Civil and Political Rights. Further, warns Mr. Danzig, even at the small rate of annual increase for per capita income set for the United Nations Development Decade in 1960 — five percent, and even this has not been uniformly achieved — this means that for the fifty percent of the globe with a per capita income under one hundred dollars a year, there is little hope in sight. "What gaineth a man," Mr. Danzig asks, "if he earns 100 dollars per annum in 1960 and 150 dollars per annum by 1970?", or, one might add, 248 dollars per annum by 1992?

No less compelling a warning is contained in the "Prologue" by Sir Percy Spender, Past President of the World Court. Like Messrs. Landau and Danzig, he too asserts that the machinery to avoid the chaos of a world that achieves too little too late by 1992 is now at hand. After nine years on the International Court of Justice, Sir Percy concludes that there is no dispute that cannot be handled by impartial third-party adjudication as a more satisfactory alternative to the armed conflicts foreseen by Mr. Danzig if no major improvements are made.

Projecting from Sir Percy's confidence in the role that third-party adjudication and the rule of law can play in the world of 1992, if governments will but let them become routine, one could visualize by that time an era in which confrontation cycles never reached the stage of resort to force of arms. In such a world, too, the mere threat of force would be no more normal between nations party to a dispute than it is between citizens in contract cases today. The only major precondition for such a world, and one deemed by Sir Percy to be lacking today, is the widespread political will to change past and present patterns that bar the effective rule of law.

K. The China Gap in World Law

The problem in the twenty-five years ahead is further complicated by the enormity of what might be called "the China Gap." There is nothing new about the fact that much of mainland China has remained, for all but a brief period, outside the mainstream of international law developments. In the nineteenth century, the Imperial Court sent several groups of students to Europe and the

United States but these groups were all small, carefully guarded against Western manners, and, where possible, isolated from the main citizenry of the host country. The course of study was limited to language, technology, arms manufacture, and military or naval science. These few hundred students were deemed failures and were recalled in 1881; only two of those in the United States had by that time finished college. As narrow and small as these attempts were to raise officials who would be trained in methods used outside China in that century, they were ultimately deemed unuseful, perhaps because the children chosen to go before 1898 were only ten to sixteen years old, and also perhaps because the antipathy towards foreign ways at court had become too deeply engrained over the centuries.⁶⁷

In the years from 1902 to 1942, some 100,000 students, who later made up more than half of the prominent men in the Republic of China, studied abroad.⁶⁸ In part because of this, some of the most perceptive contributions in world law, at the United Nations Charter conference in 1945 and in the work of various international organizations since, have been made by delegates from that government.

The China Gap was restored, however, by events on the mainland since 1950. The group which studied non-technical subjects outside China is insignificant in voice and impact today.⁶⁹ The tragedy this represents for world law is reflected in the reported rejoinder received by a high official from a country outside China during negotiations with his equally highly-placed mainland Chinese counterpart: "International law, what's that?"

The dilemma is that conduct by mainland China, military, verbal, and otherwise, tends to increase the chances that China and its 500 to 900 million people will remain outside the mainstream of world law, precisely during the quarter-century when its technical

⁶⁷ See WANG, CHINESE INTELLECTUALS AND THE WEST 1872-1949, at 42-51 (1960). For the extent of continuity in orientation and in political institutions in China, see Wilkes, "A Comparison of Political Structures Between Taoist and Maoist China" (unpub. paper, Woodrow Wilson School of Public and Int'l Affairs, Princeton University 1951).

⁶⁸ See WANG, *op. cit.* *supra* note 67, at 177, but note, however, that only a very small minority of provincial leadership ever came from this group. *Id.* at 179.

⁶⁹ John M.H. Lindbeck, Associate Director of the East-Asian Research Center at Harvard University, reports that the process of destroying this class was consciously and thoroughly carried out, which may be reflected in the reportedly small number of people working on foreign relations, low budgetary allocations for foreign affairs, and the small amount of time devoted to international affairs by governmental bodies. See *Hearings Before the Senate Committee on Foreign Relations on U.S. Policy With Respect to Mainland China*, 89th Cong., 2d Sess. 187-88, 196 (1966).

and military improvements will make it most desirable to have that state subject to the rule of law of which Sir Percy Spender speaks.

It would be a mistake to believe that the persistent votes keeping the mainland out of the United Nations are responsible for the China Gap; it is the product of conscious choices by mainland officials to stay clear of that mainstream. In short, had the recent vote on expelling representatives of Chiang Kai-shek from the United Nations and recognizing the People's Republic as the only lawful China — which failed by a vote of 46 to 57 with 17 abstaining⁷⁰ — gone overwhelmingly the other way, we would now have a Chinese delegation in the General Assembly, but we would still have the China Gap — a gulf between world law acceptances that have taken place in the rest of the world over three centuries and the vacuum with respect to that law deliberately preserved in Imperial and Maoist China. That gap must eventually be bridged, perhaps before 1992, by means and at a time one cannot now foresee.

L. The Accelerating Pace of Change in World Law

One thing is clear: if there is to be an adequate response in the world law area, it will have to be a more sober and a faster one. The historical surveys of the contributors show the considerable distances traveled in each topic since 1892. They show, too, the choices already made and the organizations already developed that make the world law of 1967 so different from that at the start of our Century. What these contributions do not, and cannot, do is tell us precisely what will happen by 1992. The most accurate prediction that can be made about the quarter-century from 1968 on is that world law will continue to change at a faster pace than ever before.

This prediction is based on several facts. First, by 1992 satellite communications will link all countries which elect to use them. Under present plans, by the end of 1969 more than fifty nations will be linked through forty "earth stations" by the INTELSAT system of communications satellites.⁷¹ Second, the last seventeen years have already shown expansions in the subject matter of world

⁷⁰ 55 DEP'T STATE BULL. 929 n.4 (1966).

⁷¹ Speech of John A. Johnson, Vice President-International of the Communications Satellite Corporation, in the symposium on "Science Challenges the Law" at Western Reserve University, Cleveland, Ohio, April 14, 1967. The name "earth station" itself is representative of the ways in which scientists become oriented toward planet-wide problems and research before international law catches up with the implications of new technology.

law more far-reaching than the changes during the entire one hundred years prior to 1917. An examination of Table II, which contrasts the new topics taught in courses in International Law today with the entire range of topics covered in 1917, vividly illustrates this point:

TABLE II
Comparison of All Topics Taught in the First Quarter-Century
With Added Topics Taught Today⁷²

<u>1892-1917</u>	<u>1967</u>
Nature and Authority of International Law	Arms Competition and the Idea of Stable Deterrence
Persons in International Law: States, Protectorates, Belligerent or Insurgent Communities	The Individual as a Subject of International Law
Continuing Personality of States	Unlawfulness of the Use of Force
Jurisdiction	Banning Nuclear Weapon Tests
Acquisition and Transfer of Jurisdiction by Discovery and Occupation, Prescription, Cession, or Conquest	Outer Space: Communications and Surveillance
Effects of Transfer	Satellites and Spacecraft
Pacific Relations: Treaties, and Extradition	Arctic Areas
Non-Belligerent Settlement of Controversies: Arbitration, Reprisals, and Embargo	Extrahazardous Activities
	Capacity of the United Nations To Administer Territory
	Genocide
	Conservation of the Living Resources of the High Seas
	World Economic Development
	Air Space
	Financing the United Nations
	Human Rights
	Peace-Keeping by The United Nations
	Security During Disarmament
	The Secretariat
	Toward a Rule of Law Community
	Membership in The United Nations
	Access to Resources: Peaceful Uses of Atomic Energy

⁷² Topics from the 1892-1917 period come from EVANS, *LEADING CASES ON INTERNATIONAL LAW* (1917); these topics are also included in contemporary texts in diverse but far different proportions, as can be seen from Evans' greater concern for the laws of war than for the peacetime aspects of international law — the topics above the line accounted for 197 pages in a 454 page book and the topics below the line accounted for the remaining pages. The new topics come from one or more of the following texts presently used in connection with courses in international law in Australia, Canada, the United Kingdom, or the United States: BISHOP, *INTERNATIONAL LAW* (2d ed. 1962); BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (1966); CASTEL, *INTERNATIONAL LAW* (1965); *THE STRATEGY OF WORLD ORDER* (Falk & Mendlovitz ed. 1965-1966); O'CONNELL, *INTERNATIONAL LAW* (1965); ORFIELD & RE, *CASES ON INTERNATIONAL LAW* (rev. ed. 1965).

	Money in International Law
	Immunities of International Organizations and Their Personnel
	War Crimes
	Antarctic Treaty
	International Administration of Justice
	Self-Determination
Belligerent Relations:	Work of the International Law Commission
War, Blockade, Contra-	Legal Devices Adopted by Investors and
band, and Neutrals	Hosts for Foreign Capital
	International Labour Organization
	Control of Narcotics
	The Prevention of World War III

The third fact which augurs an accelerated rate of change in world law is the incorporation of new disciplines — marine biology, psychology, history, the social sciences, and the new communication sciences — into the process of making world law.

Just where this accelerated pace will take international law is difficult to foresee. The lawyer who turns for the first time to the contemporary problems of international law is amazed to find how much is going on, how diverse a field it is, and how much the little glimpse he may have caught from an occasional headline or bar journal article is like the top of an iceberg whose submerged mass went as unseen as it may have been unsuspected. International lawyers attempting to foresee the impact on world law of the contributions that these aforementioned disciplines have yet to make are faced with a similar iceberg. One can predict that it will be far greater than is presently suspected, but its contours and ultimate shape remain to a large degree unfathomable.

M. Role of the Behavioral Scientist

Michael Barkun, who wrote the study on "Bringing The Insights of Behavioral Science to International Rules," is characteristic of the new breed of scholars who are helping to shape the world law of the next quarter-century. As a political scientist, he sees the instabilities of the 1892-to-1917 world as reflections of the basic ways of thinking about the rule of law which then prevailed. Paradoxically, he finds that the same "crumbling of security, power, and confidence" that culminated in World War I provides some of the grounds for today's greater reliance on *demonstrated effectiveness* of institutions and hence on the opinions of experts, who often are neither diplomats nor jurists. Professor Barkun posits, for instance, that international rules will be increasingly related to scien-

tific facts; one example should prove to be the rules for fishing discussed earlier.⁷³

Professor Barkun suggests that as foreign offices gain greater knowledge about the domestic political limits on what some states can do internationally, they may lead world law more rapidly down the path of *non-political* laws in preference to overstressing attempts to get agreement on the *political* ones. How will these "political" paths be known? Perhaps, as Professor Barkun — drawing on what political scientists are doing today — hypothesizes, by men who simulate the making of decisions by others; perhaps by computers utilizing the data of many disciplines from which — on standards of choice humans have yet to make verbal, let alone to program — this and similar questions may someday be answered.

⁷³ See text accompanying note 53 *supra*.